

EMPLOYEE MISCLASSIFICATION ADVISORY TASK FORCE ENFORCEMENT COMMITTEE REPORT FROM

The Enforcement Committee convened on June 27, 2012. Present were Committee Chair Martha Campbell, Alex Rieger, Derek Jumper and Josh Baker representing the Attorney General's Office; Norman Auffhammer, John Bassford and Blake Alford representing the Department of Labor; James Milam representing the Davidson County District Attorney's Office; and Jason Locke representing the Tennessee Bureau of Investigation (TBI). Discussion at the meeting focused on pooling resources between State agencies to investigate incidents of employee misclassification, and statutory changes necessary, if any, to existing law to facilitate enforcement.

The Enforcement Committee found the following during its discussion:

1. The Department of Labor has seven investigators but none have law enforcement powers. The District Attorney has investigators with law enforcement powers but none have training in the investigation of Labor related issues. The TBI has investigators but is statutorily prohibited from investigating any type of case not stated in Tenn. Code Ann. § 38-6-102 absent a referral from the District Attorney. The Department of Revenue's Unemployment Insurance (UI) Division has no investigators but has auditors.
2. Under the current process, the Department of Labor would refer the case to the District Attorney who would then request an investigation from TBI. However, due to resource constraints, not all claims can be investigated by the TBI.
3. The Department of Revenue has limited access to 1099 forms filed with the United States Internal Revenue Service (IRS) and can share the information with Department of Labor Investigators.
4. The Department of Labor has access to employer TRUMP accounts.
5. Incidents of probable employee misclassification—cases warranting further investigation—can be identified by comparing 1099 forms to employer TRUMP accounts.
6. Department of Labor Investigators have an established working relationship with Department of Review UI Division auditors.
7. The Department of Labor is not presently in a position to take on criminal investigations.
8. Misclassification of employees by contractors working on State projects is occurring.

9. State construction contracts may have clauses requiring contractors to comply with all State laws.

The Enforcement Committee makes the following recommendations:

1. Continue the current referral process for criminal investigations.
2. Establish a threshold for criminal investigation of misclassification. The threshold should be flexible to discourage "lesser" criminal activity but specific enough to give guidance to the referring investigator.
3. Due to resource limitations, State law should not be amended to require TBI to investigate employee misclassification.
4. The Committee should research the possibility of giving limited law enforcement powers to some Department of Labor investigators. Possible TBI oversight of the investigators should also be researched.
5. The Department of Labor and Department of Revenue UI auditors should continue in their current cooperative enforcement relationship. Expansion of the relationship, including drafting memorandums of understanding for increased information sharing, should be further researched. Greater sharing of 1099 forms for comparison to employer TRUMP accounts should be specifically considered.
6. All contractors entering into a construction contract with the State should be sent a warning letter, or have specific language included in the contract, concerning the penalties for using misclassified workers on a job site.